Alaska Workers' Compensation Appeals Commission

Terence A. Bartee, Appellant, vs. Chugach Electric Association and Liberty Insurance Corporation, Appellees.	Final Decision Decision No. 221 December 24, 2015 AWCAC Appeal No. 15-008 AWCB Decision No. 15-0013 AWCB Case No. 201307820

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 15-0013, issued at Anchorage, Alaska, on January 30, 2015, by southcentral panel members Matthew Slodowy, Chair, and Stacy Allen, Member for Labor.

Appearances: Joseph A. Kalamarides, Kalamarides & Lambert, for appellant, Terence A. Bartee; Randall J. Weddle, Holmes Weddle & Barcott, P.C., for appellees, Chugach Electric Association and Liberty Insurance Corporation.

Commission proceedings: Appeal filed February 25, 2015; briefing completed July 29, 2015; oral argument was not requested by either party.

Commissioners: Raymond Scott Bridges (*pro tempore*), S. T. Hagedorn, Andrew M. Hemenway, Chair.

By: Andrew M. Hemenway, Chair.

1. Introduction.

Terence A. Bartee injured his lower back in 2007 while working as a lineman for Chugach Electric Association (Chugach). He was found eligible for reemployment benefits. Thereafter, he accepted a modified duty position as a meter technician with Chugach and chose to receive a job dislocation benefit.

Mr. Bartee subsequently returned to a position as a lineman and, while working in that position, he injured his right wrist. The rehabilitation specialist recommended that he be found ineligible for reemployment benefits, based on his prior election to receive a job dislocation benefit. The reemployment benefits administrator's designee found that he was ineligible for that same reason.

Mr. Bartee filed a claim with the board contesting the designee's decision. The board conducted a hearing and affirmed the designee's decision. Mr. Bartee appeals. We affirm.

2. Factual background and proceedings.[1]

On June 1, 2007, Terence A. Bartee injured his low back while working for Chugach as a lineman.[2] On November 6, 2008, he was found eligible for reemployment benefits.[3] On November 7, 2008, Mr. Bartee accepted a modified duty position with Chugach as a meter technician.[4] On December 5, 2008, Mr. Bartee completed an Election of Benefits Form; he checked and initialed the box reading, "I choose to receive a job dislocation benefit. I waive (give up) my right to receive reemployment benefits."[5] Among the reemployment benefits waived was the development of a reemployment benefits plan.[6] On December 17, 2008, Mr. Bartee received a $5,000 job dislocation benefit payment.[7]

On May 28, 2010, Mr. Bartee and Chugach entered into a partial compromise and release agreement related to his June 1, 2007, injury.[8] The agreement states:

> Reemployment Benefits. The employee elected to receive the job dislocation medical benefit of $5,000 which was paid in total on 12/17/08. He has also returned to work with the employer in an alternative position as a meter reader as opposed to that of lineman. Under this release all claims for vocational rehabilitation are closed.[9]

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[1] We make no factual findings. We state the facts as found by the board in its decision, adding detail and context by reference to evidence in the record.

[2] *Terence A. Bartee v. Chugach Electric Association*, Alaska Workers' Comp. Bd. Dec. No. 15-0013 at 2 (No. 1) (Jan. 30, 2015). *See, e.g.,* R. 58, 90-91.

[3] *Bartee,* Bd. Dec. No. 15-0013 at 2 (No. 2). *See* R. 461-463.

[4] *Bartee,* Bd. Dec. No. 15-0013 at 3 (No. 3). *See* R. 52, 54.

[5] *Bartee,* Bd. Dec. No. 15-0013 at 3 (No. 5). *See* R. 25-28.

[6] *See* R. 27.

[7] *Bartee*, Bd. Dec. No. 15-0013 at 4 (No. 6). *See* R. 38-39.

[8] *Bartee*, Bd. Dec. No. 15-0013 at 4 (No. 7). *See* R. 89-97.

[9] *Bartee*, Bd. Dec. No. 15-0013 at 4 (No. 7). *See* R. 92.

Subsequent to that date, Mr. Bartee resumed working in his former position with Chugach as a lineman, a job with the same physical demands as existed at the time of his 2008 injury.[10] Thereafter, on May 29, 2013, Mr. Bartee injured his wrist on the job.[11] On November 18, 2013, he was released to work with no restrictions.[12] On November 27, 2013, Mr. Bartee again injured his right wrist while working as a lineman for Chugach.[13]

Chugach notified the reemployment benefits administrator that Mr. Bartee had been unable to return to work for more than 90 consecutive days as a result of the May 29, 2013, injury.[14] The rehabilitation specialist concluded that Mr. Bartee was ineligible for reemployment benefits, based on his 2008 election to receive a job dislocation benefit and his waiver of reemployment benefits in connection with the 2007 injury.[15] The reemployment benefits administrator's designee found him ineligible for the same reasons.[16] Mr. Bartee filed a claim contesting the designee's determination,[17] and following a hearing the board affirmed the designee's decision.

3. Standard of review.

We review a board decision in accordance with AS 23.30.128(b) and AS 23.30.122. In the context of an appeal from the board's decision reviewing a determination by the rehabilitation benefits administrator, we have stated:

> [i]f the board reviews the administrator's decision without taking new evidence, we examine whether the board's decision affirming or reversing the administrator was an abuse of the board's discretion. If the board

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10 *See Bartee*, Bd. Dec. No. 15-0013 at 4, 5 (Nos. 8, 15), R. 472-476.

11 *Bartee*, Bd. Dec. No. 15-0013 at 4 (No. 8). *See* R. 1.

12 *Bartee*, Bd. Dec. No. 15-0013 at 4 (No. 10). *See* R. 197.

13 *Bartee*, Bd. Dec. No. 15-0013 at 4 (No. 12). *See* R. 178.

14 R. 465.

15 *Bartee*, Bd. Dec. No. 15-0013 at 4-5 (No. 14). *See* R. 472-476.

16 *See Bartee*, Bd. Dec. No. 15-0013 at 5 (No. 16), R. 480-481. The designee also noted that Mr. Bartee was apparently ineligible pursuant to AS 23.30.041(f)(3). R. 480.

17 R. 13-14.

> engages in fact-finding, as it does when it takes additional testimony from witnesses or receives evidence not submitted to the administrator, we will examine whether the board's findings of fact are supported by substantial evidence in light of the whole record. On a question of law applied, or procedure used, by the administrator or the board, the commission is required to exercise its independent judgment.[18]

In this case, there is no dispute about the material facts. At issue is the application of law to those facts. We therefore exercise our independent judgment.

4. Discussion.

The board concluded that Mr. Bartee was ineligible for reemployment benefits in 2013 under AS 23.30.041(f)(2), which provides:

> (f) An employee is not eligible for reemployment benefits if . . .
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> (2) the employee previously declined the development of a reemployment plan . . . , received a job dislocation benefit . . . , and returned to work in the same or similar occupation in terms of physical demands required of the employee at the time of the previous injury.

Mr. Bartee makes two basic arguments as to why this statute does not apply to him.[19] First, he contends that his 2008 election to receive a job dislocation benefit should be disregarded. Second, assuming that argument fails, he contends that AS 23.30.041(f)(2) bars eligibility only for an injury to the same body part as was previously injured.

a. Mr. Bartee's Prior Eligibility Is Immaterial.

It is undisputed that in 2008 Mr. Bartee declined reemployment benefits and received a job dislocation benefit, and that prior to his 2013 injury he returned to work in the same occupation in terms of physical demands as previously. Thus, he meets each of the three conditions for ineligibility specified in AS 23.30.041(f)(2). Nonetheless, Mr. Bartee argues that he is now eligible, because (1) there was no evidence before the board in 2013 that in 2008 he was eligible (other than the

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[18] *Witbeck v. Superstructures, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 014 (July 13, 2006) at 14-15 (footnotes and citations omitted).

[19] Chugach no longer contends that Mr. Bartee's settlement agreement bars him from obtaining reemployment benefits. *See* Hr'g Tr. at 9:21-23, Dec. 17, 2014.

designee's November 6, 2008, determination to that effect)[20] and (2) he was ineligible for reemployment benefits in 2008, pursuant to AS 23.30.041(f)(1), because he accepted Chugach's offer of a job as a meter technician.[21] Because there is not sufficient evidence that the designee's November 6, 2008, eligibility determination was correct, Mr. Bartee asserts, "[t]he subsequent job dislocation agreement does not apply" and because in 2008 he accepted a job as a meter technician, "the job dislocation benefit [is] invalid."[22]

The unstated premise of both prongs of Mr. Bartee's argument is that if he was ineligible for reemployment benefits in 2008, then AS 23.30.041(f)(2) does not apply to bar eligibility in 2013. This is an invalid premise. Under the plain language of AS 23.30.041(f)(2), it is not prior eligibility or ineligibility that precludes subsequent eligibility for reemployment benefits; rather, it is the employee's decision to decline the development of a reemployment plan, receipt of a job dislocation benefit, and acceptance of reemployment in an equivalent occupation in terms of physical demands. Mr. Bartee has done all of those things. Whether he was actually eligible for reemployment benefits in 2008 is immaterial to his eligibility in 2013.

b. AS 23.30.041(f)(2) Applies, Regardless of the Type of Injury.

Mr. Bartee next argues that AS 23.30.041(f)(2) applies only to bar subsequent eligibility based on "the same type of injury[,]" that is, an injury to the same body part that was the basis for a prior eligibility determination.[23] To limit subsequent eligibility for reemployment benefits based on a prior injury to a different body part would be "harsh[,]" Mr. Bartee contends.[24] He argues, AS 23.30.041(f)(2) should be construed as not limiting eligibility otherwise available under AS 23.30.041(e).[25]

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20 *See* Appellant's Opening Brief at 8-9.

21 *See* Appellant's Opening Brief at 9.

22 Appellant's Opening Brief at 9.

23 *See* Appellant's Opening Brief at 10.

24 *Id.*

25 *Id.*

As to the latter point, we note that AS 23.30.041(f)(2) was clearly intended to limit eligibility that is otherwise provided under AS 23.30.041(e), notwithstanding the absence of any specific language to that effect either in AS 23.30.041(e) or in AS 23.30.041(f)(2).[26] Moreover, AS 23.30.041(f)(2) would still limit eligibility otherwise provided by AS 23.30.041(e) even if subsection (f)(2) were construed as Mr. Bartee suggests: subsection (f)(2), even if applicable only to injuries to a different body part, would still (for those injuries) limit eligibility that is otherwise provided in AS 23.30.041(e). It is the scope of the limitation stated in subsection (f)(2), not its existence, that is at issue.

Turning to the scope of the limitation created by AS 23.30.041(f)(2), we see no ambiguity in the text of subsection (f)(2). Subsection (f)(2) by its express terms applies regardless of the nature of the employee's prior and subsequent injuries. Although it is true that the legislative history cited by Chugach does not definitively preclude the reading suggested by Mr. Bartee, neither does it support his reading.[27] There is evidence in the legislative history that some members of the legislature were concerned that employees might accept the relatively small job dislocation benefit in order to provide immediate cash relief, without appreciating the potential value of rehabilitation

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[26] AS 23.30.041(f)(2) was enacted in 2005 as part of SB 130. *See* §18 Ch. 10 FSSLA 2005. To read subsection (f)(2) as anything other than a limitation on eligibility that would otherwise exist under AS 23.30.041(e) would be to render it a nullity. Testimony before multiple legislative committees clearly establishes that subsection (f)(2) was intended to limit eligibility otherwise available under AS 23.30.041(e). *See generally,* Appellees' Opening Brief at 14-15, notes 60-64.

[27] *See, e.g.*, Testimony of Paul Lisankie, Director of Division of Worker's Compensation, Senate Labor and Commerce Committee (March 31, 2005). Responding to Senator Bunde's question, "what would prevent an injured worker who took a cash settlement from coming back for a second unrelated injury", Director Lisankie testified "if an injured worker gets the benefit and then goes back to work in the same occupation in terms of physical demand, that disqualifies him from a second claim if he gets a second injury." As Mr. Bartee points out, Director Lisankie did not add, "no matter what body part", but nothing in his comment reveals an ambiguity, and Senator Bunde's reference to an "unrelated injury" suggests Director Lisankie's response was not limited to injuries to the same body part and was so understood by the members of the committee.

benefits thereby lost.[28] But this concern did not manifest itself in an attempt to limit the scope of subsection (f)(2) to injuries to the same body part, much less in the adoption of any specific language to that effect.[29]

Mr. Bartee characterizes the denial of reemployment benefits to an employee who has previously declined them in order to receive a job dislocation benefit based on an injury to a different body part as harsh.[30] We do not see that this is harsh, or unfair to an injured worker,[31] given that the worker remains eligible for the full array of other compensation benefits for the new injury to a different body part. In any event, that this result may be harsh is not grounds for ignoring the plain language of AS 23.30.041(f)(2), given the absence of ambiguity in the statutory language, the legislature's intent to limit eligibility otherwise provided under AS 23.30.041(e), and the absence of any legislative history indicating that the legislature intended to restrict AS 23.30.041(f)(2) to injuries to a different body part.[32]

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[28] Senator Ellis offered an amendment (not adopted) to SB 130 that would have eliminated proposed subsection (f)(2), citing concerns to this effect that had been expressed by vocational rehabilitation specialists. *See* Minutes of Senate Judiciary Committee (March 31, 2005). *See also, e.g.*, Testimony of vocational rehabilitation counselor Marjorie Linder, Senate Judiciary Committee (April 7, 2005) (noting $5,000 job dislocation benefit "is a relatively small sum of money when required to sign away for life any future ability to have retraining."). Neither of the versions of SB 130 considered in the standing committees of the House of Representatives included proposed AS 23.23.041(f)(2). *See* HCS CSSB 130 (L&C), HCS CSSB 130 (JUD) (2005).

[29] In addition to amendments offered in the Senate Judiciary Committee, an amendment to require that acceptance of the job dislocation benefit be subjected to mandatory review by the board, offered by Senator French, was rejected by the free conference committee that considered SB 130. *See* Minutes of Free Conference Committee on SB 130 (May 20, 2005).

[30] *See supra*, note 24.

[31] We are mindful that the legislature intends that AS 23.30 be interpreted in a manner that ensures the "fair" (among other specified goals) delivery of benefits to injured workers. AS 23.30.001.

[32] *See Konecky v. Camco Wireline, Inc.*, 920 P.2d 277, 282 (Alaska 1996) ("If the language of the statute is unambiguous and expresses the intent of the legislature, and if no ambiguity is revealed by the legislative history, we will not modify or extend a statute by judicial construction.") (citations omitted).

5. Conclusion.

The board's decision is AFFIRMED.

Date: *December 24, 2015* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Unavailable for signature
Raymond Scott Bridges, Appeals Commissioner
pro tempore

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Andrew M. Hemenway, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the supreme court must be filed no later than 30 days after the date shown in the commission's notice of distribution (the box below).

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*.

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

RECONSIDERATION

A party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the commission no later than 30 days after the date shown in the commission's notice of distribution (the box below).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 221 issued in the matter of *Terence A. Bartee vs. Chugach Electric Association and Liberty Insurance Corporation,* AWCAC Appeal No. 15-008, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on December 24, 2015.

Date: *December 28, 2015*

Signed
K. Morrison, Appeals Commission Clerk